

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

DERRICK SWEETING,  
Plaintiff,

vs

THOMAS SCHWEITZER, *et al.*,  
Defendants.

Case No. 1:17-cv-727

Dlott, J.  
Bowman, M.J.

**REPORT AND  
RECOMMENDATION**

Plaintiff, an inmate at the Lebanon Correctional Institution, brings this action against defendants Thomas Schweitzer, Major Spurlock, Lt. Husbard, Lt. Couch, Lt. Shankin, and Sgt. Mrs. Hilis. (*See* Doc. 1, Complaint at PageID 10). By separate Order, plaintiff has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. This matter is before the Court for a sua sponte review of the complaint to determine whether the complaint, or any portion of it, should be dismissed because it is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant who is immune from such relief. *See* Prison Litigation Reform Act of 1995 § 804, 28 U.S.C. § 1915(e)(2)(B); § 805, 28 U.S.C. § 1915A(b).

In enacting the original *in forma pauperis* statute, Congress recognized that a “litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To prevent such abusive litigation, Congress has authorized federal courts to dismiss an *in forma pauperis* complaint if they are satisfied that the action is frivolous or malicious. *Id.*; *see also* 28 U.S.C. §§ 1915(e)(2)(B)(i) and 1915A(b)(1). A complaint may be dismissed as frivolous when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke v. Williams*, 490 U.S. 319, 328-29 (1989); *see also* *Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th

Cir. 1990). An action has no arguable legal basis when the defendant is immune from suit or when plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or “wholly incredible.” *Denton*, 504 U.S. at 32; *Lawler*, 898 F.2d at 1199. The Court need not accept as true factual allegations that are “fantastic or delusional” in reviewing a complaint for frivolousness. *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Neitzke*, 490 U.S. at 328).

Congress also has authorized the *sua sponte* dismissal of complaints that fail to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915 (e)(2)(B)(ii) and 1915A(b)(1). A complaint filed by a *pro se* plaintiff must be “liberally construed” and “held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). By the same token, however, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Hill*, 630 F.3d at 470-71 (“dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim” under §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The Court must accept all well-pleaded factual allegations as true, but need not “accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286

(1986)). Although a complaint need not contain “detailed factual allegations,” it must provide “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557. The complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson*, 551 U.S. at 93 (citations omitted).

Based on the allegations of the complaint, it appears that plaintiff seeks to bring this action in connection with a December 23, 2016 incident between plaintiff and another inmate. Plaintiff claims that he was hospitalized following the incident for serious injuries, and appears to seek payment for his hospital bills and money damages.

In its entirety, the allegations of the complaint are as follows:

Mr. Thomas Schweitzer was fully aware that Marcus Arnold 729-464 had put me in the hospital 12-23-16. I was involved in a argument with Sgt Hilis about checking in her block. She told me why did I threatning her by saying on the kite I would get the blood game members to start a war. Now I asks her where is the kite and why didn't I get a conduct report she then stated if I don't check in her block she will get me crash on by boys who in the blood game members. I was serious injury I had to learn how to walk again I then was charged with hospital bills for another inmate crashing on me. They charged 1,405.00. I'm asking for the Courts to stop these charges and make Lebanon Correctional pay for my hospital bills. Please contact me as soon as possible. Thank you I ask to suite for also 2.5 million.

(Doc. 1-1, Complaint at PageID 11).

Plaintiff's complaint should be dismissed because he has failed to state a viable claim under § 1983, which requires a showing of a deprivation of “a right secured by the United States Constitution or a federal statute.” *See Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003).

As an initial matter, plaintiff includes no factual allegations against defendants Lt. Couch, Lt. Husband, Lt. Shankin, or Major Spurlock. The complaint should therefore be dismissed as to these defendants.

The complaint only contains allegations against defendants Thomas Schweitzer and Sgt. Hilis. Plaintiff's only allegation against defendant Thomas Schweitzer is that he was aware that plaintiff was hospitalized after his altercation with inmate Arnold. Plaintiff does not allege that Schweitzer was aware that Arnold posed a substantial risk of harm to plaintiff prior to the attack or any other facts to suggest Schweitzer failed to protect him from harm. With respect to Hilis, plaintiff claims that he was in an argument with her and that Hilis threatened that she would "get [plaintiff] crash on by boys who [are] in the blood game." (Doc. 1-1, Complaint at PageID 11). Plaintiff does not allege that Hilis or Schweitzer had any personal involvement in his injuries. The complaint otherwise provides no factual content or context from which the Court may reasonably infer that these defendants violated plaintiff's rights.

To the extent that plaintiff seeks to hold Hilis liable for threatening him, it is well-settled that "[v]erbal harassment or idle threats by a state actor do not create a constitutional violation and are insufficient to support a section 1983 claim for relief." *Wingo v. Tennessee Dep't of Corr.*, 499 F. App'x 453, 455 (6th Cir. 2012) (per curiam) (citing *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987)); see also *Chilcott v. Erie Cnty. Domestic Relations*, 283 F. App'x 8, 11 (3rd Cir. 2008) (and Sixth, Fifth and Tenth Circuit cases cited therein). Cf. *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545–46 (6th Cir. 2004). As noted above, plaintiff has not alleged that Hilis took any other action against him or pled sufficient factual content for the Court to

reasonably infer that Hilis acted on her threat. Plaintiff does not indicate, for example, when his argument with Hilis occurred, whether it predated the December 23, 2016 incident, or allege any factual content to suggest that the attack was related to the argument.

Finally, to the extent that plaintiff contends that his being charged for his medical expenses resulted in a due process violation, he has also failed to state an actionable claim under § 1983. In order to assert a due process claim, plaintiff must first plead, and ultimately prove, the inadequacy of state remedies for redressing the wrong. *See Vicory v. Walton*, 721 F.2d 1062, 1066 (6th Cir.1983). *See also Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*, *Daniel v. Williams*, 474 U.S. 517 (1984). “If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury,” *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 587–88 (6th Cir. 2004). Accordingly, in order to state a procedural due process claim under section 1983 “the plaintiff must attack the state’s corrective procedure as well as the substantive wrong,” *Meyers v. City of Cincinnati*, 934 F.2d 726, 731 (6th Cir.1991) (quoting *Vicory*, 721 F.2d at 1066). A plaintiff “may not seek relief under Section 1983 without first pleading and proving the inadequacy of state or administrative processes and remedies to redress [his] due process violations.” *Jefferson*, 360 F.3d at 588.

Plaintiff has not alleged any facts even remotely indicating that his remedies under Ohio law to redress the wrong of which he complains are inadequate. Plaintiff’s complaint fails to explain why a state tort remedy would not suffice to address his claim. *See Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir.1999). Therefore, plaintiff fails to state a due process claim that is actionable in this § 1983 proceeding.

**IT IS THEREFORE RECOMMENDED THAT:**

1. The complaint be **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B).
2. The Court certify pursuant to 28 U.S.C. § 1915(a)(3) that for the foregoing reasons an appeal of any Order adopting this Report and Recommendation would not be taken in good faith, and therefore, deny plaintiff leave to appeal *in forma pauperis*. See *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997).

s/ Stephanie K. Bowman  
Stephanie K. Bowman  
United States Magistrate Judge

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**NOTICE**

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation (“R&R”) within **FOURTEEN (14) DAYS** after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within **FOURTEEN DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).